NO. 22361

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HOLLOWAY HOUSE PUBLISHING CO.,
a California corporation,

Appellant,

vs.

WESLEY S. SHARP, individually, and as Chief of Police of the City of San Diego, and EDWARD T. BUTLER, Individually, and as City Attorney for the City of San Diego,

Appellees.

APPELLANT'S REPLY BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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STATEMENT

The principal thrust of Respondents' Brief is "abstention". Respondents do not dispute that the complaint states a claim upon which relief could be granted by a federal District Court. There is no denial of the jurisdiction of the District Court to entertain the claim for declaratory and injunctive relief under governing federal statutes. Indeed, the respondents concede that, absent the issue of abstention, triable issues of fact were presented which precluded the grant of the motion for summary judgment in

favor of respondents, dismissing the complaint. Indeed, respondents conclude the brief with the statement that if "this Court disagrees with the application of the Doctrine of Abstention", then the "only choice would be to remand the cause to the District Court for trial" (Resp. Br. 17).

ARGUMENT

I

THE DISTRICT COURT HAD THE DUTY TO DECIDE THE APPROPRIATENESS AND THE MERITS OF THE REQUEST OF APPELLANT FOR DECLARATORY AND INJUNCTIVE RELIEF. IT WAS ERROR TO APPLY THE DOCTRINE OF ABSTENTION AND TO DISMISS APPELLANT'S COMPLAINT. (Replying to Resp. Arg. 3-16).

I. Respondents state that a federal court, faced with a petition to grant injunctive relief where a state proceeding is pending, "must initially consider the possible application of the Doctrine of Abstention" (Resp. Br. 3).

The aforesaid statement is based on two incorrect premises. In the first place, given a proper invocation of federal jurisdiction conferred by Congress and the Constitution, the doctrine of abstention is not an "initial consideration", but a principle to be invoked only in the last resort in very narrowly limited "special circumstances". Zwickler v. Koota, 389 U.S. 241, 88 S. Ct. 391, 395, 19 L. Ed. 2d 444. In the second place, this was not a petition to grant injunctive relief against some

pending state proceeding. The relief sought here is declaratory relief and injunction against individual law enforcement officials engaging in unlawful conduct. The appellant did not seek to enjoin any state proceeding. See Zwickler v. Koota, 389 U.S. 241, 88 S. Ct. 391, 395, 19 L. Ed. 2d 444. See also Corsican Productions v. Pitchess, 338 F. 2d 441 (9 Cir. 1964). See also R. T. 8-9. [1]

The decisions in Douglas v. City of Jeannette and Stefanelli v. Minard, relied upon by respondents (Resp. Br. 4-5), are not relevant to the issues presented in these proceedings. See, Appellant's Opening Brief 14-20. See, the recent decisions of the United States Supreme Court in Damico v. California, 88 S. Ct. 526 (Dec. 18, 1967) and Sweetbriar Institute v. Button, 387 U.S. 423, 87 S. Ct. 1710, 18 L. Ed. 2d 865. See also, on remand, Sweetbriar Institute v. Button, 280 F. Supp. 312 (D. C. Va. 1967), permanent injunction granted.

For similar reasons, reliance by respondents upon Title 28, United States Code §2283 (Resp. Br. 5 n. 3) is also misplaced. This is not an action to stay proceedings in a state court. The complaint seeks only a declaration that respondents are engaging in conduct in violation of federal laws and the federal Constitution, and for injunctive relief against such unlawful conduct by the individual respondents acting under color of law. See, Dombrowski v. Pfister, 380 U.S. 479, 85 S. Ct. 1116, 1119 n. 2.

II-A. The respondents continually attempt to avoid the

1/ The reference "R. T." is to the Reporter's Transcript of proceedings on the hearing of the motions for summary judgment.

nature and character of the proceedings instituted by appellant in the federal court. The complaint was directed against the conduct of respondents in threatening to immediately and continuously prosecute retail owners in San Diego who sought to enter into business relations with appellant, the publisher of The Complete Marquis de Sade. The principal thrust of the complaint was that respondents threatened to continue in their unlawful conduct so as to permanently exclude the publications from sale and distribution in the City of San Diego. The prayer of the complaint, was, among other things, for declaratory relief with respect to such threatened conduct and for injunctive relief solely against respondents' threats, or other acts or practices, which interfere with the sale or distribution of the publication in the City of San Diego (App. Br. 3-6).

It is difficult for the respondents to deny that the appellant stated a claim for relief under the laws of the United States and the Constitution. That declaratory and injunctive relief may be obtained in a federal court against law enforcement officers attempting to impose an "informal censorship" is well established (App. Br. 16-17). Indeed, respondents decline to meet this issue by asserting that if "censorship" is to be equated with "threats of prosecution", then no censorship is involved because respondents are not threatening prosecution (Resp. Br. 8). Such an assertion is baseless under the circumstances of the record here presented.

In the first place, the respondents candidly concede that

they have arrested various retail bookstore owners who sold the publication and charged them with violations of the state obscenity law; and respondents concede that a total of nine defendants are involved in those arrests (Resp. Br. 1-2). Clearly, the threats of further prosecutions of all retailers who seek to purchase the book from appellant in San Diego are implicit in the very concessions made by respondents. "And there comes a point where this Court should not be ignorant as judges of what we know as men." Watts v. Indiana, 338 U.S. 49, 69 S. Ct. 1347, 1349, 93 L. Ed. 1801.

In the second place, the respondents are in error in relying upon certain of their own "proposed findings of fact" with respect to the issue of threatened prosecutions (Resp. Br. 8-9). These findings were not signed by the court below. Indeed, on this very issue the court below stated to counsel for respondents:

> "THE COURT: I don't see much difference, Counsel, between a threat and prosecution. I mean there isn't -- you can't distinguish between the two." (R. T. 25).

In the third place, respondents disregard the admonition contained in Zwickler v. Koota, 389 U.S. 241, 88 S. Ct. 391, 19 L. Ed. 2d 444. A request for a declaratory judgment must be considered separate and apart from the prayer for injunctive relief. The mere fact that there is a request for injunctive relief does not create a "special circumstance" justifying the

doctrine of abstention. It is enough that the complaint and supporting papers set forth a cause of action against the attempt by respondents to impose a censorship in the City of San Diego upon appellant's publication. In this respect alone, appellant was clearly entitled to declaratory and injunctive relief, and under Zwickler it was error to deprive appellant of his access to a federal court to vindicate a federal right conferred upon him by the Congress of the United States and the Constitution. It is only when it appears that a plaintiff can prove no set of facts in support of his claim which would entitle him to relief that a complaint under the Civil Rights Act may be dismissed. Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80; York v. Story, 324 F. 2d 450 (9 Cir. 1963).

The respondents attempt to distinguish Zwickler v. Koota on untenable grounds. Respondents assert that the state proceedings in Zwickler had been completely terminated, and when threatened state prosecution under the same statute continued, the defendant in that case instituted an action in the federal district court. Respondents then argue that in such a case there "was no other forum in which the question was pending nor where a hearing could be had on the constitutional issue" (Resp. Br. 9).

However, it should be observed that the three judge court in Zwickler, which applied the doctrine of abstention upon the ground that the appellant in that case could assert his constitutional challenge in defense of any criminal prosecution for any future violation of the statute, or bring an action in the state court

for declaratory judgment, was reversed by the United States Supreme Court. In Zwickler, appellant was attempting to enjoin a criminal prosecution, albeit a future prosecution, and was seeking relief against an action which was remote in time and dependent upon his own violation of the law. Yet, despite all this, the Supreme Court held that Zwickler was entitled to maintain his claim in the federal court for declaratory and injunctive relief. In the case herein, appellant is not seeking to enjoin any criminal prosecution, and the unlawful conduct of respondents in seeking to impose a censorship in the entire City of San Diego, with respect to The Complete Marquis de Sade, is a present and continuing threat. Zwickler, therefore, cannot be distinguished in respondent's favor, but, on the contrary, is very much opposed to its position.

The attempt to distinguish Corsican Productions v. Pitchess, 338 F. 2d 441 (9 Cir. 1964) is also fruitless (Resp. Br. 10-11). The sole basis of the distinction appears to be that in Corsican there were allegedly only threats of prosecution "with the purpose of suppressing the film" (Resp. Br. 10), while here it is asserted there has only been good faith prosecution. But, it is perfectly clear and conceded by respondents, and understood by the court below, that the continued prosecutions of every retail dealer in San Diego by respondents is a deliberate attempt to suppress The Complete Marquis de Sade; and this unlawful attempt under the laws and Constitution of the United States is the essence of the publisher's complaint, appellant here. Corsican Productions,

therefore, is clearly supportive of appellant's position.

Respondents reiterate their reliance upon the decisions in the Third Circuit; but, as pointed out in Appellant's Opening Brief, this is not a case which attempts to enjoin criminal prosecutions; the decisions are not in accord with Corsican Productions and were decided before the ruling by the United States Supreme Court in Zwickler v. Koota, 389 U.S. 241, 88 S. Ct. 391, 19 L. Ed. 2d 444.

II-B. The respondents argue that appellant has not shown a danger of irreparable injury for which he has no legal remedy (Resp. Br. 12-15). Respondents do not seriously contend that the appellant will not suffer great loss and damage to its standing, reputation, prestige, business and good will by reason of the conduct of respondents; and that the conduct of respondents, if continued, will result in a continued financial loss to appellant, as well as a deprivation of the right of the people of the City of San Diego to read the publication involved.

The gist of respondents' argument here appears to be that appellant's injury is not irreparable because "the same questions of fact and law" (Resp. Br. 11) are involved in the state court criminal prosecutions against the retailers in San Diego, and thus appellant's rights will be adequately protected (Resp. Br. 11, 12-15).

This position is erroneous for two reasons. In the first place, the conduct of respondents, which is the subject matter

of the prosecution in the federal courts involving, as it does, issues of censorship over books in the City of San Diego, is not a definitive issue in the state court criminal prosecutions against the retailers under the state obscenity law. In the second place, it is not correct to state that the state court criminal prosecutions will necessarily resolve the issues involved herein. Just as in Zwickler, for example, it is possible for a reversal of the conviction of the retailers to which respondents refer to be based upon state law grounds; and, in such case, there may be protracted subsequent litigation without any decisive result. With respect to the retailers who are being prosecuted in the state court proceedings, the failure of proof of scienter may be dispositive of all the criminal cases without resolving the basic issues relative to the constitutional protection of the publication itself. In the meantime, the conduct of respondents may continue unabated, and a book which is entitled to constitutional protection will be suppressed in violation of the guarantees of the free speech and press provisions of the Constitution. Freedman v. Maryland, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649.

The respondents' arguments with respect to alleged lack of "irreparable injury" were implicitly rejected in Zwickler v. Koota and in Corsican Productions. See also, cases cited in Appellant's Opening Brief, pp. 16-17.

III. Respondents' attempt to fit the proceedings here into the mold of an action to "enjoin the pending state proceedings"

(Resp. Br. 15) is without support in this record or in the law. The cases cited by respondents do not support its position and, rightly considered, are opposed to its position. This is not an action to enjoin the use or misappropriation of trade secrets in a state court; or an action by an accused to enjoin the use of intercepted telephone conversations in a state criminal prosecution; or an action seeking an injunction to restrain a party from pursuing contempt proceedings in a state court; or an action to enjoin officials from prosecuting a plaintiff for perjury in a state court.

This is an action directed against the censorship imposed by respondents in the City of San Diego with respect to the publication The Complete Marquis de Sade. The appellant is not seeking to enjoin any state criminal prosecutions. The relief sought is a declaration that respondents are engaged in conduct which constitutes a previous restraint on the circulation of a publication and the suppression of that publication, and that respondents be enjoined from such unlawful conduct.

IV. Absent the issue of "abstention", the respondents do not deny that the order of the court below, granting respondents' motion for summary judgment and dismissing the complaint, was clear error. The respondents concede that "triable issues of fact" do exist. Respondents state that with respect to the issue of "social importance" there could not exist a "a more basic question of fact" than the genuineness of that assertion. It is

avowed that the issue "cannot be determined without a full hearing designed to disclose facts bearing on this point" (Resp. Br. 17).

Thus, respondents conclude that, if "this court disagrees with the application of the Doctrine of Abstention", then the "only choice would be to remand the cause to the District Court for trial" (Resp. Br. 17). Respondents fail to add, even on their own terms, with respect to abstention, that "it is better practice, in a case raising a federal constitutional or statutory claim, to retain jurisdiction, rather than to dismiss" (Zwickler v. Koota, 88 S. Ct. at 393, n. 4).

CONCLUSION

As respondents' arguments themselves make clear, the District Court erred in granting respondents' motion for summary judgment and dismissing the complaint. The order and judgment of the District Court should be reversed.

Respectfully submitted,
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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Stanley Fleishman
STANLEY FLEISHMAN